IN THE SUPREME COURT OF THE STATE OF DELAWARE

KEVIN DICKENS,	§	
	§	
Defendant Below-Appellant,	§	No. 472, 2008
	§	
	§	
v.	§	Court Below—Superior Court
	§	of the State of Delaware,
STATE OF DELAWARE,	§	in and for New Castle County
	§	Cr. ID 0708003661
Plaintiff Below-Appellee.	§	
	§	

Submitted: May 24, 2010
Decided: July 23, 2010

Before **HOLLAND**, **JACOBS**, and **RIDGELY** Justices.

O R D E R

This 23rd day of July 2010, upon consideration of the appellant's Supreme Court Rule 26(c) brief, his attorney's motion to withdraw, the State's response thereto, and the State's supplemental response, it appears to the Court that:

(1) A grand jury indicted the defendant, Kevin Dickens, on multiple assault charges in September 2007. Prior to his trial, Dickens was permitted to discharge his court-appointed counsel and to represent himself at trial. On May 29, 2008, following a six-day trial, a Superior Court jury found Dickens guilty of four counts of assault in a detention facility and one count of second degree assault. The Superior Court sentenced Dickens to a

total period of thirty-one years at Level V incarceration, to be suspended after serving nine years (with the first six being minimum mandatory) for decreasing levels of supervision. After Dickens filed his opening brief on appeal *pro se*, the case was remanded to the Superior Court to prepare necessary transcripts and to determine whether Dickens had knowingly waived his right to counsel on direct appeal. Following remand, counsel was appointed to represent Dickens in this appeal.

(2) Dickens' counsel on appeal now has filed a brief and a motion to withdraw pursuant to Rule 26(c). Dickens' counsel asserts that, based upon a complete and careful examination of the record, there are no arguably appealable issues. By letter, Dickens' attorney informed him of the provisions of Rule 26(c) and provided Dickens with a copy of the motion to withdraw and the accompanying brief. Dickens also was informed of his right to supplement his attorney's presentation. Dickens failed to respond to his counsel's motion and brief. The State has responded to the position taken by Dickens' counsel and also has responded to the issues raised in the *pro se* opening brief that Dickens filed on March 16, 2009, prior to defense counsel's appointment. The State has moved to affirm the Superior Court's judgment.

(3) The standard and scope of review applicable to the consideration of a motion to withdraw and an accompanying brief under Rule 26(c) is twofold: (a) this Court must be satisfied that defense counsel has made a conscientious examination of the record and the law for arguable claims; and (b) this Court must conduct its own review of the record and determine whether the appeal is so totally devoid of at least arguably appealable issues that it can be decided without an adversary presentation.[1]

(4) The record reflects that Dickens' charges arose from a series of incidents that occurred between July 25, 2007 and August 1, 2007 while Dickens was incarcerated at the Vaughn Correctional Center in Smyrna, Delaware. The State's evidence at trial established that, on July 25, 2007, Dickens threw a mixture of hot water, urine, and feces at Correctional Officer ("CO") Lingenfelter as the officer was handing out clean laundry on Dickens' tier in the secured housing unit (SHU) of the facility. Shortly thereafter, while a quick response team (QRT) was attempting to extract Dickens from his cell, Dickens threw a similar hot mixture at CO McCreanor, which caused first degree burns. Two days later, Dickens threw a mixture of urine, feces and hot water at CO Jordan while he was collecting

[1] *Penson v. Ohio*, 488 U.S. 75, 83 (1988); *McCoy v. Court of Appeals of Wisconsin*, 486 U.S. 429, 442 (1988); *Anders v. California*, 386 U.S. 738, 744 (1967).

dinner trays from inmates. When the QRT responded to Dickens' cell, Dickens, who had covered his arms in feces, put CO Behney in a headlock. As a result of these incidents, the procedures for feeding Dickens were changed so that Dickens was moved into an interview room monitored by three officers and a supervisor in order to be fed his meals. On August 1, 2007, after he was moved to the interview room for dinner, CO Jordan entered the room to serve Dickens his food tray. Dickens rushed at CO Jordan. Sergeant Newman attempted to stop Dickens and re-sprained his shoulder, which had been injured on July 27 during the QRT cell extraction of Dickens. Newman offered medical reports regarding the July 27 injury but not for the August 1 re-injury. All of the correctional officers involved testified at Dickens' trial.

(5) Dickens presented several witnesses and also testified in his own defense. Dickens admitted throwing hot water, urine, and feces on the correctional officers but offered explanations for why he did so. The gist of Dickens' testimony was that his behavior started as a protest to the officers' mistreatment of him and, thereafter, his actions were taken as defensive measures to prevent the QRT from assaulting him. The jury convicted him of all charges.

(6) In the pro se opening brief he filed before counsel was appointed, Dickens raised the following ten claims: (i) the trial court erred by failing to instruct the jury on the lesser included offenses of disorderly conduct, offensive touching, and third degree assault; (ii) the trial court erred by failing to instruct the jury on the law of self-defense; (iii) the trial erred by failing to acquit Dickens of second degree assault for insufficient evidence and for instructing the jury on causation; (iv) the trial court erred by failing to dismiss Juror No. 3 after she disclosed that she had an uncle who was a correctional officer; (v) the trial court erred by failing to grant a mistrial after a defense witness informed the jury that Juror No. 3 was related to a correctional officer; (vi) the trial court erred failing to strike the jury for *Batson* violations; (vii) the assault in a detention facility statute, 11 Del. C. § 1254, is unconstitutional because it violates the Equal Protection Clause; (viii) the trial court erred by denying Dickens' request for transcript at State expense;[2] (ix) the trial court erred by modifying his sentence, sua sponte, to eliminate the requirement that Dickens serve his sentence at the Sussex Correctional Institute; and (x) the trial court erred by sentencing him for assault in a detention facility without first determining whether the jury

[2] This issue was resolved when this Court remanded the appeal to Superior Court for preparation of the trial transcripts. Accordingly, this issue is moot.

found him guilty under 11 Del. C. § 1254(a) or § 1254(c).[3] We address these claims seriatim.

(7) Dickens first argues that the Superior Court erred in denying his request to instruct the jury on disorderly conduct,[4] offensive touching[5] and third degree assault[6] as lesser included offenses to assault in a detention facility.[7] We review this claim de novo.[8] A trial judge must grant a request for an instruction on a lesser included offense if the following four requirements are met: (1) the defendant makes a proper request; (2) the lesser included offense contains some but not all of the elements of the charged offense; (3) the elements differentiating the two offenses are in

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[3] The reindictment, filed on May 12, 2008, charged alternatively that Dickens "did intentionally cause physical injury and/or did intentionally strike with urine, feces, or other bodily fluid" four correctional officers. *See* 11 Del. C. §§ 1254(a), (c).

[4] 11 Del. C. § 1301(1)(f), among other things, provides that a person is guilty of disorderly conduct when the person intentionally causes alarm to any other person by creating a "hazardous or physically offensive condition which serves no legitimate purpose."

[5] 11 Del. C. § 601(a)(2) provides that a person is guilty of offensive touching when the person "[i]ntentionally strikes another person with saliva, urine, feces or any other bodily fluid, knowing that the person is thereby likely to cause offense or alarm to such other person."

[6] 11 Del. C. § 611(a) provides that a person is guilty of third degree assault when the person "intentionally or recklessly causes physical injury to another person."

[7] 11 Del. C. § 1254 provides, among other things, that any inmate confined in a detention facility is guilty of assault in a detention facility if the inmate "intentionally causes physical injury" or "intentionally strikes with urine or feces or other bodily fluid" a correctional officer or other State employee of a detention facility acting in the lawful performance of duties." *See* 11 Del. C. §§ 1254(a), (c).

[8] *Weber v. State*, 971 A.2d 135, 141 (Del. 2009).

dispute; and (4) there is some evidence that would allow the jury rationally to acquit the defendant on the greater charge and convict on the lesser charge.[9]

(8) In this case, the State concedes that Dickens' proposed lesser included offenses all have elements included within the charged offense of assault in a detention facility. The State contends, however, that the only element differentiating the offenses is the requirement that the assault occur in a detention facility. The State argues that because the location of the assaults was not in dispute, Dickens was not entitled to the lesser included offense instructions.

(9) Dickens argues, however, that the element differentiating the offenses is the requirement that the assault take place in a correctional facility upon a correctional officer or other State employee "acting in the lawful performance of duties."[10] Dickens contends that he was entitled to the lesser included offense instructions because the issue of whether the guards were acting in the lawful performance of their duties was a fact in dispute and the jury rationally could have found in his favor. We disagree. While Dickens may not have liked the way the correctional officers were

[9] *Hignutt v. State*, 958 A.2d 863, 869 (Del. 2008).

[10] 11 Del. C. § 1254(c).

performing their duties, the testimony at trial was undisputed that Dickens' assaultive behavior occurred while the officers were performing lawful duties, such as handing out laundry, removing him from his cell, and feeding him. There was no rational basis for the jury to acquit Dickens of assault in a detention facility and convict him of a lesser included offense.[11]

(10) Similarly, we find no error in the Superior Court's refusal to instruct the jury on self-defense. As this Court previously has noted, the use of force in self-defense is only justified "when the defendant believes that such force is immediately necessary for the purpose of protecting the defendant against the use of unlawful force by the other [person] on the present occasion."[12] Dickens' own testimony established that his assault on CO Lingenfelter and his assault and attempted assault on CO Jordan were unprovoked by any threat of force by either man. Moreover, as the Superior Court noted in denying Dickens' request for the justification instruction, his assaults on the QRT members were merely preemptive strikes designed to

[11] 11 Del. C. § 206(c).

[12] *Dickens v. State*, 2008 WL 880162, at 2 (Del. Apr. 2, 2008) (quoting 11 Del. C. § 464(a)).

stop what were otherwise lawful actions by correctional officials.[13] The Superior Court's conclusion is supported by the record.

(11) Dickens next argues that the Superior Court erred in instructing the jury on the issue of causation and in failing to grant an acquittal on the charge of second degree assault. With respect to the charge of second degree assault, the trial judge instructed the jury that it must find that Dickens intended to cause physical injury. The trial court further instructed that the element of intent "is not established if the actual result is outside the intention of the defendant *unless*: the actual result differed from the intended result only in the respect that a different person was injured or affected[; or, two] the actual result involved the same kind of injury or harm as the probable result."[14] Dickens does not deny that he intended to assault CO Jordan. He asserts, however, that it was not his intent to harm CO Jordan's shoulder, therefore, he was not the "cause" of the injury that occurred to CO Newman's shoulder when he tried to stop Dickens from assaulting CO Jordan. The trial judge, however, correctly instructed the jury on the law and we find the evidence was sufficient as a matter of law for the jury to convict Dickens for second degree assault for causing injury to CO

[13] The use of force by correctional officials is legally permitted to enforce the lawful rules or procedures of an institution. 11 Del. C. § 468(5)(a).

[14] The trial court's jury instruction was based upon language found in 11 Del. C. § 262.

Newman's shoulder when he attempted to prevent Dickens' assault on CO Jordan.[15]

(12) Dickens next argues that the Superior Court erred in failing to dismiss Juror #3 after she disclosed that she saw her husband's uncle, CO Smith, working in the courtroom as a correctional officer. The juror's revelation came on the second day of trial when CO Smith, who had transportation duties that day, walked into the courtroom. The juror told the trial judge that she had not previously disclosed information about her husband's uncle's occupation because she believed that he had retired and because he was not a close relative. The trial judge asked the juror if her relationship would impair her ability to render a fair verdict. The juror replied that she only saw her husband's uncle once every year and that her relationship would not impact her impartiality. The Superior Court allowed her to remain on the jury over Dickens' objection.

(13) The determination of a juror's impartiality is the responsibility of the trial judge who has an opportunity to question the juror, observe the juror's demeanor, and evaluate the juror's ability to render a fair verdict.[16] A trial judge's determination not to discharge a juror, following *voir dire*, will

[15] *See Raymond v. State*, 2007 WL 666778 (Del. Mar. 6, 2007) (holding that a victim's testimony is sufficient to prove physical injury for purposes of second degree assault).

[16] *Morrissey v. State*, 620 A.2d 207, 214 (Del. 1993).

not be overturned by this Court in the absence of a demonstration of a "prejudicial abuse" of discretion.[17] In this case, the juror came forward when she saw her husband's uncle step into the courtroom. During voir dire, she indicated that her relationship with her husband's uncle was not close, which is why she had not previously disclosed it. She further stated that she had not mentioned her relationship to CO Smith to any other juror and that her relationship would not affect her ability to render an impartial verdict. Under the circumstances, we do not find any prejudicial abuse of discretion by the trial court in refusing to discharge the juror.

(14) Dickens next argues that the Superior Court erred in failing to grant a mistrial after Dickens' own witness remarked to the jury during his testimony that Juror #3 was related to CO Smith. A trial judge, however, is only required to grant a mistrial when there is "no meaningful or practical" alternative to that remedy.[18] This Court articulated a four-part analysis to determine whether a witness' unsolicited, prejudicial comments require a mistrial: (i) the nature and frequency of the comments; (ii) the likelihood of resulting prejudice; (iii) the closeness of the case; and (iv) the sufficiency of

[17] *Skinner v. State*, 575 A.2d 1108, 1120 (Del. 1990).

[18] *Dawson v. State*, 637 A.2d 57, 62 (Del. 1994).

the trial judge's efforts to mitigate any prejudice.[19] In this case, there was a single isolated remark by Dickens' own witness, the likelihood of prejudice was minimal, the case was not close, and the trial court gave a prompt curative instruction. Under the circumstances, there was no "manifest injustice" requiring a mistrial.[20]

(15) Dickens next contends that the trial court erred by failing to strike the jury because neither the jury venire nor the petit jury represented a fair cross section of the community.[21] He asserts that, of the fifty to sixty members of the jury venire, only five or six were African-American, which is twice as low as the percentage of African-Americans living in New Castle County. Only two African-Americans were called by the clerk, and one of those individuals was struck by the State for cause. Dickens specifically argues that the court clerk's process for selecting individual jurors from the venire to sit on the petit jury was not random.[22]

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[19] *Pena v. State*, 856 A.2d 548, 550-51 (Del. 2004).

[20] *Steckel v. State*, 711 A.2d 5, 11 (Del. 1998).

[21] Dickens raises no argument with respect to the composition of the jury venire in the body of his opening brief on appeal. Accordingly, we consider that claim waived and only address his argument challenging the composition of the petit jury. *Murphy v. State*, 632 A.2d 1150, 1152 (Del. 1993).

[22] In response to Dickens' allegations about the petit jury selection process, the Court directed the State to supplement the record documenting the process used in this case.

(16) To establish a prima facie violation of the fair cross section requirement, a defendant must show that: (i) the group alleged to be excluded is a distinctive group in the community; (ii) the representation of this group in the venire is not fair and reasonable in relation to the number of such persons in the community; and (iii) the under-representation is due to systematic exclusion of the group in the jury selection process.[23]

(17) In his opening brief, Dickens asserts that, in previous trials, petit jurors names were selected by the clerk who randomly picked the names from a box. In the present case, Dickens asserts that the court clerk examined a list before calling the names of petit jurors forward and that the clerk then would look at Dickens with a "mocking smirk," which indicated to Dickens that the court clerk was selecting jurors based on their race. When Dickens complained to the trial judge that the court clerk was examining the jurors' race on the juror profile list before selection, the trial court rejected Dickens' complaint as mere speculation.

(18) The State responds that, while the process of selecting names from a box previously had been the usual practice in the Superior Court, that

[23] *Duren v. Missouri*, 439 U.S. 357, 364 (1979).

particular selection method is not statutorily required[24] and is no longer used. The State asserts that, while the parties received an alphabetized list of the members of the jury venire, the court clerk's list was a computer-generated, randomized list. The State asserts that, after jurors were struck for cause, 38 of the original 60 members of the jury venire remained. Of those 38, 11 were white men (29%), 20 were white women (53%), 3 were black men (8%), 2 were black women (5%), 1 was a Hispanic man (2.5%), and 1 was an Asian or Hispanic woman (2.5%). The initial 12 jurors seated were 4 white men, 7 white women, and 1 black woman. The remaining jury pool thus consisted of 7 white men, 13 white women, 3 black men, 1 black woman, 1 Hispanic man, and 1 Asian or Hispanic woman. Dickens used his peremptory challenges to remove 2 white men and 5 white women. The State used its peremptory challenges to remove 2 white men and 1 black man. As jurors were stricken, the court clerk called, in order: 3 white women, 1 black man, 3 white women, 1 white man, and 1 Hispanic man. The jury ultimately consisted of 3 white men (25%), 7 white women (58%), 1 black woman (8%), 1 Hispanic man (8%).

[24] *See Gattis v. State*, 637 A.2d 808, 814 (Del. 1994) (noting that, although randomness in the selection of petit jury members is necessary, the particular practice of selecting names from a box is no longer statutorily required).

(19) Given the composition of the venire and the ultimate composition of the jury, we find no support for Dickens' assertion that the court clerk manipulated the petit jury selection process to exclude African-Americans from his jury. In the absence of a showing that the jury selection method resulted in the systematic exclusion of a cognizable group, there is no violation of the Sixth Amendment.[25] Accordingly, we find no merit to Dickens' claim on appeal.

(20) Dickens next argues that the assault in a detention facility statute, 11 Del. C. § 1254, is unconstitutional because it violates equal protection principles. Specifically, Dickens argues that because the statute treats prisoners differently than non-prisoners, it violates equal protection. For statutory discrimination to be unconstitutional, the distinction drawn must be "patently arbitrary and bear no rational relationship to a legitimate governmental interest."[26] We find the distinction here to be rationally related to a legitimate state purpose. Punishing convicted felons more seriously than those who have not been convicted of a crime is rationally related to the legitimate purpose of protecting correctional officers and other employees working in detention facilities from the inmates with whom they

[25] *Gattis v. State*, 637 A.2d 808, 817 n.5 (Del. 1994) (citing *Duren v. Missouri*, 439 U.S. 357, 364 (1979)).

[26] *Hughes v. State*, 653 A.2d 241, 247 (Del. 1994).

interact on an almost daily basis. We find Dickens' argument entirely without merit.

(21) Dickens' next two arguments relate to his sentencing. First, he argues that the Superior Court violated his due process rights when it modified its original sentencing order to eliminate the requirement that Dickens serve his sentence at the Sussex Correctional Institute. At his sentencing on August 25, 2008, Dickens appeared pro se with his stand-by counsel present. The Superior Court judge indicated that it would include in its sentencing order a provision that Dickens serve his Level V sentence at the Sussex Correctional Institute. The sentencing judge informed Dickens, however, that the provision was subject to the Department of Correction informing the judge if any portion of the sentence could not be carried out. At the conclusion of the sentencing hearing, the judge asked Dickens if he intended to represent himself on appeal. Dickens stated that was his intention. The Superior Court therefore relieved stand-by counsel of any further responsibilities in the case without any objection from Dickens.

(22) Thereafter, the Department of Correction informed the Superior Court that Dickens could not be housed at any institution other than the Vaughn Correctional Center. The Superior Court held a hearing on the issue on October 24, 2008, which resulted in the trial court modifying its

sentencing order to eliminate the housing provision. Dickens did not request the appointment of counsel or stand-by counsel for the hearing or otherwise renounce his assertion of his right to self-representation. Moreover, because the only modification to Dickens' sentence was the elimination of the housing provision, which is a matter within the jurisdiction of the Department of Correction,[27] Dickens cannot establish any prejudice from the Superior Court's failure, *sua sponte*, to appoint counsel for Dickens.

(23) Finally, Dickens argues that the Superior Court erred in sentencing him on the charges of assault in a detention facility without first ascertaining whether the jury found him guilty under 1254(a) (for intentionally causing physical injury) or 1254(c) (for intentionally striking with urine, feces, or other bodily fluid) because the minimum mandatory terms of incarceration are different for each subsection. Section 1254(a) has a two-year minimum mandatory term of incarceration, while Section 1254(c) has only a one-year minimum mandatory term.

(24) The record reflects that Counts I and II of the reindictment against Dickens charged him in the alternative under Sections 1254(a) and (c) with respect to the incidents involving CO Lingenfelter and CO McCreanor. Counts III and IV charged Dickens only under section 1254(c)

[27] *See* 11 Del. C. §§6504(8), 6527(b).

for intentionally striking CO Jordan and CO Behney with bodily fluids. The record further reflects that when the Superior Court instructed the jury on the elements of Assault in a Detention Facility, it *only* instructed the jury on the elements of 1254(c). Nonetheless, the Superior Court sentenced Dickens on Counts I and II as if he had been convicted pursuant to the terms of 1254(a) because the sentencing order provided that the first two years of each sentence was a minimum mandatory term of incarceration.

(25) The State concedes this was error. Accordingly, the State asserts that Dickens' case must be remanded to the Superior Court for the sole purpose of correcting the sentencing order to reduce the minimum mandatory term of incarceration from two years to one year for each of the first two counts of assault in a detention facility. We agree.

(26) Accordingly, this matter shall be remanded to the Superior Court for the sole purpose of correcting Dickens' sentence in accordance with this Order. In all other respects, the judgment of the Superior Court shall be affirmed.

NOW, THEREFORE, IT IS ORDERED that the State's motion to affirm is GRANTED. This matter shall be REMANDED to the Superior Court for correction of its sentencing order. In all other respects, the

judgment of the Superior Court is AFFIRMED. The motion to withdraw is moot. Jurisdiction is not retained.

BY THE COURT:

/s/ Jack B. Jacobs
Justice